Affirmed and Memorandum Opinion filed July 30, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00641-CV

THOMAS A. WICHMAN, Appellant

V.

KELSEY-SEYBOLD MEDICAL GROUP, PLLC D/B/A KELSEY-SEYBOLD CLINIC AND NED SNYDER, III, M.D., Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2016-69933

M E M O R A N D U M O P I N I O N

The plaintiff in a medical-negligence case argues on appeal that the trial court should have granted his motion for new trial based on a juror's alleged misconduct. Concluding that the trial court did not err by denying the motion for new trial, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellee/defendant Ned Snyder, III., M.D. performed a screening

colonoscopy on appellant/plaintiff Thomas A Wichman. Appellee/defendant Kelsey-Seybold Medical Group, PLLC d/b/a Kelsey-Seybold Clinic stipulated that Dr. Snyder performed this procedure in the course and scope of his employment with Kelsey-Seybold.

Wichman filed suit against Dr. Synder and Kelsey-Seybold (collectively, the "Kelsey-Seybold Parties") alleging that Dr. Snyder negligently performed the colonoscopy and in the process punctured Wichman's rectum, causing severe and debilitating injuries. The Kelsey-Seybold Parties defended against Wichman's claims by asserting, among other things, that Wichman's injuries were caused in whole or in part by his pre-existing diverticulosis.

During voir dire in the jury trial, venire member 10 stated, "[m]y dad, maybe about five or six years ago, had diverticulitis, and we were very fortunate to catch it, you know, in time, and everything was good, you know, his surgery went well, but he did have the . . . bag for a very long time. . . eventually he did get better and he's fine now." Venire member 10 ("Juror 10") ultimately served on the jury.

The trial court included in the jury charge an instruction that the jurors should not share any special knowledge or experiences with other jurors and that the jurors should not consider or discuss evidence that was not admitted in the courtroom. During jury deliberations, the presiding juror sent the trial court the following question: "Is there any other evidence we can use other than what is in this room?" The trial court responded: "You have heard all of the evidence and have all of the exhibits."

Later in the jury deliberations, one of the jurors ("Juror 29") informed the bailiff that another juror was violating the instructions the trial court had given in the jury charge. The trial court questioned Juror 29 in open court, outside the hearing of the other jurors. The juror informed the trial court that one of the jurors

told the other jurors that (1) her father had diverticulitis;[1] (2) "it would have happened no matter what"; and (3) her father had no pain and then he woke up one day and started moving, he went into excruciating pain and had to be hospitalized and have surgery. The lawyers had no questions for Juror 29. After the juror left, the trial court asked the lawyers if they had any motions, and each lawyer said he did not. The trial court asked if the lawyers wanted to request any additional instructions to the jury in light of Juror 29's report, and each lawyer said he would defer to what the trial court thought was best. The trial court stated that it was inclined not to give any further instructions to the jury at that point, and each lawyer said he had no problem with that approach.

Later that day, Wichman's counsel asked that the trial court speak with the juror who allegedly had made the comment about her father, and if the trial court determined that the juror was biased in a way that would affect the outcome of the jury deliberations that the trial court excuse the juror and give a curative instruction to the remaining jurors. Counsel for the Kelsey-Seybold Parties opposed any admonishment or excusing of the juror in question and suggested that it would be better to inquire into this alleged juror misconduct after a verdict and after talking with the jurors. Wichman's counsel asked the trial court to speak with the juror in question and then said he would leave it to the trial court's discretion as to what steps to take based on what the juror said. The trial court responded that it would not excuse the juror under any circumstances and that the court would not single the juror out, ask the juror questions, and then excuse the juror. The trial court invited Wichman's counsel to move for a mistrial if he wanted to do so. The trial court then asked whether the lawyers wanted the court to instruct the jury that jurors should not share any personal experiences with other jurors and that the jury

[1] Juror 29 and another juror later testified by affidavit that Juror 10 said her father had diverticulosis rather than diverticulitis, but this difference does not affect our analysis.

should disregard any personal experiences that already had been shared during deliberations. The trial court stated it would give such an instruction if counsel wanted the court to do so. Counsel for the Kelsey-Seybold Parties stated that he did not want the court to give an instruction, and Wichman's counsel stated that in light of the trial court's decision not to speak with the juror in question, he would not request an instruction. Wichman's counsel did not move for a mistrial.

The same day the jury reached a 10-2 verdict, finding that the preponderance of evidence at trial did not show that Dr. Snyder's negligence, if any, proximately caused the occurrence in question.

Wichman timely filed a motion for new trial, asserting the following points:

- The juror who allegedly shared her father's medical history during deliberations was Juror 10.
- Contrary to the trial court's instructions, Juror 10 allegedly brought extraneous, outside information about her father's experience with diverticulosis into the jury deliberations.
- Juror 10 injected this extraneous, outside information into the deliberations for the express purpose of aiding the Kelsey-Seybold Parties' "diverticulosis defense" and to undermine Wichman's claims that Dr. Snyder's negligence proximately caused his injuries.
- Juror 10 engaged in material misconduct that probably caused injury to Wichman's case.
- Wichman indicated that Juror 10's interjection of extraneous, outside information into the jury deliberations constituted the exercise of an outside influence on the jurors.

Wichman relied on the statements of Juror 29 in open court while the jury was deliberating, as well as an affidavit in which Juror 29 stated:

- One of the jurors shared her personal experiences with the jurors during deliberations.
- This juror "basically" said that her father had had diverticulosis and that what happened to Wichman was "going to happen no matter

what" and that her father had diverticulosis and did not have any symptoms until he woke up one day in "excruciating pain."

- This juror talked about her father's experience during both days of the deliberations.

Wichman submitted an affidavit from another juror who testified as follows:

- During jury deliberations, Juror 10 mentioned three times that her father had had diverticulosis, that what happened to Wichman was "going to happen no matter what," and that her father did not have any symptoms until he woke up one day in "excruciating pain."
- Juror 10 mentioned this story three times, before Juror 29 left the jury-deliberation room as well as after Juror 29 left.

The Kelsey-Seybold Parties opposed the motion for new trial and objected that the testimony of the jurors as to Juror 10's conduct during the jury deliberations was inadmissible and incompetent under Texas Rule of Evidence 606 and Texas Rule of Civil Procedure 327. The Kelsey-Seybold Parties asserted that the jurors' testimony did not address whether any outside influence was brought to bear on any juror. The trial court held a hearing on the motion for new trial. After hearing argument, the trial court denied the motion for new trial and concluded that under precedent in civil cases the jurors' testimony did not address an outside influence and should not be considered.

II. ISSUES AND ANALYSIS

A. Did the jurors' testimony as to jury deliberations address an outside influence brought to bear on a juror?

Under his first appellate issue, Wichman asserts that the trial court should have granted his motion for new trial based on Juror 10's alleged juror misconduct, which Wichman claims involved an outside influence brought to bear on a juror. We review the trial court's denial of Wichman's motion for new trial under the abuse-of-discretion standard of review. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000).

The interest in safeguarding a fair trial before an impartial tribunal may weigh in favor of rectifying a jury verdict improperly decided because of juror misconduct. *See id.* at 366. Nonetheless, in promulgating procedural rules, the Supreme Court of Texas and the Court of Criminal Appeals have balanced this interest against several reasons losing parties should not be allowed to conduct unfettered investigations into the jury's deliberations to try to prove alleged juror misconduct, essentially putting the jury on trial. *See* Tex. R. Evid. 606; Tex. R. Civ. P. 327; *Golden Eagle Archery, Inc.*, 24 S.W.3d at 366–69. These reasons include:

(1) Jury deliberations must be kept private to encourage jurors to discuss the case candidly, without fear that their deliberations later will be held up to public scrutiny.

(2) The jurors need to be protected from post-trial harassment or tampering. Jury service will be less attractive if the litigants can harass a juror after trial, call a juror to testify about jury deliberations, and make juror deliberations public.

(3) A disgruntled juror whose view did not prevail in the jury room may want to seek vindication by providing testimony about jury deliberations in an effort to prove a basis for overturning the verdict — a significant concern in Texas civil trials, in which the verdict may be less than unanimous.[2]

(4) A need exists for finality, and litigation must end at some point if the public is to have any confidence in judgments.

Golden Eagle Archery, Inc., 24 S.W.3d at 367.

Texas Rule of Civil Procedure 327(b) states:

> A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any

[2] The two jurors who testified in today's case about the jury deliberations were the two jurors who did not sign the jury's verdict.

> outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Tex. R. Civ. P. 327(b).

Texas Rule of Evidence 606(b) provides:

> **(1) *Prohibited Testimony or Other Evidence*.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
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> **(2) *Exceptions*.** A juror may testify:
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> **(A)** about whether an outside influence was improperly brought to bear on any juror; or
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> **(B)** to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606(b).[3] Both Rule 327(b) and Rule 606(b) provide that jurors may not testify about statements or matters occurring during jury deliberations, but they may testify about an outside influence improperly brought to bear on a juror. *See* Tex. R. Evid. 606; Tex. R. Civ. P. 327. Under binding precedent from both the Supreme Court of Texas and this court, the jurors' discussion of improper matters during deliberations does not constitute the bringing to bear of an outside influence on a juror; thus, Rule 327(b) and Rule 606(b) prohibit a trial court from considering a juror's testimony as to such discussions. *See Golden Eagle Archery, Inc.*, 24 S.W.3d at 370, 373–74; *Baley v. W/W Interests, Inc*., 754 S.W.2d 313, 316 (Tex. App.—Houston [14th Dist.] 1988, writ denied), *overruled in part on other grounds by Golden Eagle Archery, Inc.*, 24 S.W.3d at 371–72; *Robinson Elec. Supply Co. v. Cadillac Cable Corp*., 706 S.W.2d 130, 132 (Tex. App.—Houston

[3] The second exception in Rule 606(b)(2) has not been raised and is not at issue in today's case.

[14th Dist.] 1986, writ ref'd n.r.e.), *overruled in part on other grounds by Golden Eagle Archery, Inc.*, 24 S.W.3d at 369 & n.3. Under this precedent, an "outside influence" must originate from sources other than the jurors themselves. *See Golden Eagle Archery, Inc.*, 24 S.W.3d at 370; *Baley*, 754 S.W.2d at 316; *Robinson Elec. Supply Co.*, 706 S.W.2d at 132.[4]

Wichman relies upon *In re Health Care Unlimited, Inc*., but that case is not on point because it did not involve any testimony by a juror as to jury deliberations. *See* 429 S.W.3d 600, 601–04 (Tex. 2014). Wichman also relies on *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012), a criminal case. But because the case before us is a civil appeal, in deciding it we must follow the precedent of the Supreme Court of Texas rather than the Court of Criminal Appeals. *See Rice v. Rice*, 533 S.W.3d 58, 62 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

This court has held that two jurors' sharing with other jurors the special knowledge they obtained from visiting the scene of the decedent's death in a wrongful-death case did not constitute an "outside influence" and that jurors' discussion of a newspaper article that was not in evidence did not amount to an "outside influence." *See Baley*, 754 S.W.2d at 316. Sister courts of appeals likewise have held that a juror's injection of the juror's personal experiences, knowledge, or expertise into the jury deliberations, though improper, does not constitute an "outside influence" on the jury because it emanates from inside the jury. *See Soliz v. Saenz*, 779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, writ denied) (holding that a juror's improper discussion of his personal knowledge of the bar involved in the wrongful-death case based on his prior experiences at

[4] In *Golden Eagle Archery*, the Supreme Court of Texas approved of these parts of the *Baley* and *Robinson Electric* cases. *See Golden Eagle Archery, Inc.*, 24 S.W.3d at 370; *Baley*, 754 S.W.2d at 316; *Robinson Elec. Supply Co.*, 706 S.W.2d at 132.

that bar did not constitute an outside influence); *Baker v. Wal-Mart Stores, Inc.*, 727 S.W.2d 53, 54–55 (Tex. App.—Beaumont 1987, no writ) (holding a statement by a juror was not an outside influence, even though the juror, a nurse, said that the medication plaintiff was taking could have made plaintiff drowsy and caused the fall that resulted in the plaintiff's personal injuries).

In today's case two jurors testified as to alleged juror misconduct by Juror 10 — the alleged sharing with other jurors about her father's diverticulosis and his lack of symptoms until he woke up one day in "excruciating pain." According to the two witnesses, Juror 10 told the other jurors that what happened to Wichman was "going to happen no matter what." Juror 29's statements in open court and the affidavit testimony of Juror 29 and the other juror reflect that during deliberations Juror 10 shared her personal experiences and inferences or conclusions about Wichman's medical condition based on these experiences. Under binding precedent, all of this testimony concerned statements or matters occurring during jury deliberations, and none of this testimony addressed an outside influence brought to bear on a juror. *See Golden Eagle Archery, Inc.*, 24 S.W.3d at 370, 373–74; *Baley*, 754 S.W.2d at 316; *Robinson Elec. Supply Co.*, 706 S.W.2d at 132. Wichman did not submit any evidence from a source other than a juror. The trial court did not err in determining that the testimony from the two jurors did not address an outside influence and should not be considered, and the trial court did not err in denying Wichman's motion for new trial. *See Golden Eagle Archery, Inc.*, 24 S.W.3d at 370, 373–74; *Baley*, 754 S.W.2d at 316; *Robinson Elec. Supply Co.*, 706 S.W.2d at 132. Thus, we overrule Wichman's first issue.

B. Did Wichman preserve error on his due-process and equal-protection complaints?

In his second issue, Wichman asserts that, if under the precedent applicable in a civil appeal, the jurors' testimony in this case does not address an outside

influence under Rule 606(b), but under the precedent applicable in a criminal appeal, the jurors' testimony would address an outside influence under Rule 606(b), then Wichman's due-process and equal-protection rights have been violated. Wichman waived his due-process and equal-protection complaints by not presenting either complaint in the trial court. *See In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) (to preserve argument for appellate review, including constitutional arguments, a party must present it to trial court by timely request, motion, or objection, state specific grounds therefore, and obtain ruling); *Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (appellants waived *Batson* complaint by failing to preserve error in the trial court). In any event, the *McQuarrie* case involved a juror's sharing with the other jurors the results of the juror's out-of-court internet research concerning the effects of a drug at issue in the trial. *See McQuarrie*, 380 S.W.3d at 148. In today's case, no juror testified that Juror 10 conducted out-of-court research or contacted her father during trial to ask him questions about the case. Instead, Juror 10 allegedly shared her personal experience of her father's medical history and the conclusion she had drawn from it. Even after *McQuarrie*, the Court of Criminal Appeals has stated that a juror's discussion of the juror's personal knowledge does not fall within Rule 606(b)'s outside-influence exception. *See Colyer v. State*, 428 S.W.3d 117, 125 (Tex. Crim. App. 2014). We overrule Wichman's second issue.

Having overruled both of Wichman's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan.